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In the Supreme Court of the United States

OCTOBER TERM, 1954

FEDERAL POWER COMMISSION, PETITIONER

v.

THE STATE OF OREGON, THE FISH COMMISSION OF OREGON, THE OREGON STATE GAME COMMISSION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL POWER COMMISSION

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INTRODUCTION

There are three basic errors in the respondents' brief. They are:

[1]. The assertion that the United States has not been delegated by the Constitution the power to legislate in regard to the acquisition and control of rights to the use of water in non-navigable streams (Brief for Respondents, pp. 15, 25). The error of that contention is sharply outlined by the decisions of the Supreme Court of Oregon which have repeatedly recognized the ownership by the United States of the unappropriated

rights to the use of water in the non-navigable streams.

[2]. To support their contention, respondents cite cases involving encroachment upon *vested rights* (*Ickes* v. *Fox*, 300 U. S. 82; *Federal Power Commission* v. *Niagara Mohawk Power Corporation*, 347 U. S. 239; *Federal Power Commission* v. *Niagara Mohawk Power Corporation*, 202 F. 2d 190). These authorities are irrelevant here. There is no encroachment, invasion, or impingement (or threat of encroachment, invasion, or impingement) upon vested rights to the use of water.

[3]. Respondents would inject into this proceeding the question of the general right of the several States to determine whether there will be adherence to the doctrine of prior appropriation, the common law doctrine of riparian rights, or the hybrid system which exists in the State of Oregon. That issue is likewise not presented. It is indisputable that each State may make that determination insofar as it concerns matters within its jurisdiction. As Oregon has no jurisdiction over the United States or its property, the State's determination on the subject is not pertinent to this case. What is involved here is the issue whether the United States is the owner of, or has control over, the unappropriated rights to the use of the water and is free in the administration of those rights from restraint by the State.

Those cardinal errors of respondents will be considered in the succeeding sections of this Reply Brief. But at the outset we may point to the significant fact that respondents neither refer to nor rely upon the opinion of the Court of Appeals which has been brought here for review. In seeking to avoid the plain and serious error of the Court of Appeals, they pursue an equally untenable course.

I

AS THE DECISIONS OF THE SUPREME COURT OF OREGON RECOGNIZE, THE UNITED STATES RETAINS TITLE TO, AND POWER OF CONTROL OVER, ALL RIGHTS TO THE USE OF THE UNAPPROPRIATED WATERS IN NON-NAVIGABLE STREAMS TO WHICH THE DESERT LAND ACT AND RELATED ACTS APPLY

A. Oregon's Supreme Court has repeatedly recognized the United States as the owner of the unappropriated waters in non-navigable streams of that State, even under the Desert Land Act. Main Brief for the Federal Power Commission, pp. 45 *et seq.*; *Hough* v. *Porter*, 51 Ore. 318, 382, *et seq.*; *Nevada Ditch Company* v. *Bennett*, 30 Ore. 59, 104; *Brown* v. *Baker*, 39 Ore. 66, 68; *Morgan* v. *Shaw*, 47 Ore. 333, 337; *Williams* v. *Altnow*, 51 Ore. 275, 298. With specific reference to the Desert Land Act of 1877, the Supreme Court of Oregon stated (*Hough* v. *Porter*, *supra*, at 391):

> * * * the import thereof [the Desert Land Act] being that this right incident

> to the soil was reserved by the government, to be held in trust for the public, and that he who first applies the water to a beneficial use shall become the owner of the right thereto, * * *.

That statement by Oregon's Supreme Court in one of the leading decisions in western water law fully conforms with its earlier declaration on the same subject (*Nevada Ditch Co.* v. *Bennett, supra,* at 104):

> It may be predicated of the waters of non-navigable streams upon the public domain, that are not appropriated by the methods cognizant to law, that they are as much the property of the government as the lands through which they flow: * * * the waters of non-navigable streams are part of such public domain, and hence the property of the government, which may lay hold of and use them, without taking any of the steps made necessary to obtain an usufructuary interest therein by private individuals.

As pointed out in our main brief (pp. 31 *et seq.,* esp. 38–41, 44–50), these Oregon decisions reflect the clear import of the language of the Desert Land Act which refers to "*public* lands" and holding their waters free for the appropriation and use "of the *public*". [Emphasis added.] There are no words of grant and no reference is made to the States. The Act constitutes a *reservation* by the United States of the unappropri-

ated waters on public lands for acquisition by the *public* under the specific conditions imposed by the statute. In *Ickes* v. *Fox,* 300 U. S. 82, 95, heavily relied upon by respondents, this Court said: "The federal government, as owner of the public domain, had the power to dispose of the land and water composing it together or separately; and by the Desert Land Act of 1877 * * * Congress had severed the land and waters constituting the public domain and established the rule that for the future the lands should be patented separately. * * * all nonnavigable waters were *reserved* for the use of the *public* under the laws of the various arid-land states." [Emphasis added.]

B. The crux of the question here (if the Desert Land Act applies at all) is the legal meaning of a "reservation" of the character contained in the Act. The Oregon decision of *Hough* v. *Porter, supra,* at 387–388, provides the answer: "A 'reservation' as here used [in the Desert Land Act] is something taken from the whole thing covered by the general terms making the grant, and cuts down and lessens it (or act, under which title to the *res* from which the reservation may be made) from what it would be except for such reservation: * * * The latter term ['reservation'] applied here [means]: The national government by its various laws relating to *public lands* granted to its citizens the privilege of acquiring title thereto. Construing all together

as one act, the Desert Land Act by the language used appears to *reserve* therefrom to the entire public the right of any citizen, after March 3, 1877, to divert, use, and acquire a right in and to the unappropriated waters flowing through, or adjacent to, any lands thereafter patented, such right to be determined by priority." [Emphasis added.] And a comparable Oregon decision earlier declared: "An appropriation of water is *a grant* by the general government to the settler of the right to its use from a nonnavigable stream * * *." [Emphasis added.] *Morgan* v. *Shaw,* 47 Ore. 333, 337. Only if title resided in the United States could there be a "grant" to the appropriator.

It is an elementary principle of real property law that a "reservation" must always be in favor of the grantor. 6 *Thompson on Real Property,* Per. Ed., 3458; 4 *Tiffany, Real Property,* 3rd Ed. 972; 37 *Words and Phrases,* Per. Ed. 164, 165, citing *Hough* v. *Porter,* 51 Ore. 318. Certainly, the Congress could reserve to the United States the unappropriated rights to the use of water in the manner which it did in the Desert Land Act. For as this Court has declared: "The power of the Government to reserve the waters and exempt them from appropriation under the state laws is not denied, and could not be." *Winters* v. *United States,* 207 U. S. 564, 577. And the general power of Congress over federal land and property

cannot be disputed. See our main brief, pp. 22–23.

Thus, the "reservation" in the Desert Land Act of 1877—recognized by this Court in the case of *Ickes* v. *Fox, supra*—is in favor of the United States. Respondents' assertions that in some manner the Congress divested the United States of all right, title, interest, control, and sovereignty over the waters of nonnavigable streams entering its *public* lands are contrary to:

> (*a*) The decisions of the Supreme Court of the State of Oregon which recognize that title to the unappropriated rights to the use of the water within that state is reserved by and remains in the United States;
>
> (*b*) The express language of the Desert Land Act and related acts which *reserved* the unappropriated rights to the use of water for acquisition by the *public;* and
>
> (*c*) The basic principles of real property law that a "reservation" of the unappropriated rights to the use of water—such as that contained in the Desert Land Act—is an estate in favor of the grantor—in this instance the United States.

C. Contrary to the Court of Appeals' declaration that "* * * Oregon has the right to regulate its *own waters* in its own chosen way" (R. III 1041), respondents contend that neither Oregon nor the United States may possess rights to the use of water without application of it to beneficial use in the same way that a private person

would obtain such rights. Brief for Respondents, p. 23. That the State of Oregon has not used the presently unappropriated rights to the use of water which the Pelton Project would beneficially apply is beyond question.

As for the United States, the simple answer to this contention is that the United States has *not* parted with title or the right to control the unappropriated rights to the use of the water, but reserved and retains such title and rights. This is the main thread of our argument in this case. It is well supported and illustrated by the well-known decision in *Howeli* v. *Johnson,* 89 Fed. 556, 558 (C. C. D. Mont.), cited with approval by this Court in *California Oregon Power Company* v. *Beaver Portland Cement Company,* 295 U. S. 142, 162, and by the Oregon Supreme Court in *Hough* v. *Porter, supra.* Involved in that case was the question of whether rights to the use of water allegedly acquired pursuant to the laws of the State of Wyoming would be recognized in the State of Montana in which the stream rises. In declaring the United States was the source of the title to appropriative rights, the court stated:

"The rights of plaintiff do not, therefore, rest upon the laws of Wyoming, but upon the laws of congress.

"*The legislative enactment of Wyoming was only a condition which brought the law of congress into force.* * * *

"The federal government is not restrained in the disposal of its lands by state laws or state lines. * * *

"It is urged that in some way the state of Montana has some right in these waters in Sage creek or some control over the same. It never purchased them. It never owned them." [Emphasis added.]

This analysis brings into sharp outline the basic error of the Court of Appeals when it declares that the United States granted to the States ownership and control of all the waters in non-navigable streams. Similarly, it emphasizes how untenable is the position of respondents, who, being unable to support the opinion of the Court of Appeals, assert that the United States does not have the power under the Constitution to legislate in regard to rights to the use of water in non-navigable streams.

II

THIS CASE DOES NOT INVOLVE THE INVASION, ENCROACHMENT, OR INTERFERENCE WITH ANY VESTED RIGHTS AND THEREFORE THE AUTHORITIES UPON WHICH RESPONDENTS RELY ARE NOT PERTINENT

There will be no diversion of water from the Deschutes River by the Pelton Project; the water having passed through or over the dam, being beneficially applied to the generation of electricity in the process, flows undiminished down the natural bed of the stream. The Pelton Project

will not interfere with, invade, or encroach upon any rights to the use of water in the stream. Those facts are recognized by the Court of Appeals (R. III 1034); they are not challenged by respondents. It is undisputed that the Pelton Power Dam and Plant will thus utilize presently wasted unappropriated rights to the use of water in the Deschutes River, title to which is claimed by the United States.

The license which the Federal Power Commission granted the company to go upon lands of the United States, withdrawn for power purposes, and there utilize the presently unappropriated rights to the use of water was in accordance with the specific requirements of the Federal Power Act: The Federal Power Commission is empowered: "* * * To issue licenses * * * to any corporation organized under the laws of the United States or any State thereof, * * * for the purpose of constructing, operating, and maintaining dams, water conduits, reservoirs, power houses, transmission lines, * * * for the development * * * transmission, and utilization of power * * * upon any part of the public lands and reservations of the United States * * *" (16 U. S. C. 796; Main Brief for the Federal Power Commission, Appendix A, page 59). The authority of the United States thus to administer its property is free from doubt. Brief for the Federal Power Commission, pages 22, et seq.; *supra*, Point I.

As the rights in question are presently unappropriated and unused, and no private rights are concerned, the inapplicability of the authorities relied upon by respondents is manifest. There is, for example, no relationship between this case involving presently unappropriated rights to the use of water and this Court's decision in *Ickes* v. *Fox,* 300 U. S. 82. There, the question was, in substance, whether the United States was an indispensable party to a proceeding involving an alleged invasion by the Secretary of the Interior of *vested* and long exercised appropriative rights to the use of water in a Reclamation Project. There was likewise involved the question of the rights and authority of the Secretary of the Interior under contracts to impound and divert water for the beneficiaries on that Reclamation Project. The error of relying here upon *Ickes* v. *Fox* is revealed by the fact that the Pelton Project is specifically made subject to "all existing rights, whether or not perfected" (R. II 443). There is, of course, no doubt that vested rights to the use of water may not be violated by the sovereign without just compensation being paid. *United States* v. *Gerlach Live Stock Co.,* 339 U. S. 725. We do not contend otherwise in this or our main brief.

For the same reason, the case of the *Federal Power Commission* v. *Niagara Mohawk Corporation,* 202 F. 2d 190, 347 U. S. 239, has no application. The beginning sentence of this Court's de-

cision shows the inapplicability of the principle there enunciated: "The most significant issue raised by this case is whether the Federal Water Power Act of 1920 has abolished private proprietary rights, existing under state law, to use waters of a navigable stream for power purposes" (347 U. S. 239, 240, 241). As emphasized throughout our argument, "private proprietary rights" are not involved here. There is presented only the claim by the United States to the unappropriated rights to the use of water in a non-navigable stream traversing federal lands reserved for power purposes.

III

THE UNITED STATES IS NOT ATTEMPTING TO DICTATE TO THE STATES WHETHER THEY SHOULD ADHERE TO ANY PARTICULAR SYSTEM OF LAW RELATING TO RIGHTS TO THE USE OF WATER WITHIN THEIR JURISDICTIONS BUT THE RIGHTS TO THE USE OF WATER INVOLVED IN THIS CASE ARE NOT WITHIN THE JURISDICTION OF THE STATE OF OREGON

The principle for which we contend does not in any way conflict with the basic tenet of water law that the power of changing the common law rule respecting riparian rights within their dominion belongs to the States. *United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 703; *Hough* v. *Porter*, 51 Ore. 318, 400, 402. That power of the States is not and could not be successfully denied. The proposition is, however, limited by this Court's specific declaration that the States

may not legislate respecting the laws governing rights to the use of water which "would destroy the right of the United States, as the owner of lands bordering on a stream, to the continued flow of its waters * * *" (*United States* v. *Rio Grande Irrigation Co.*, 174 U. S. 690, 703; *Winters* v. *United States*, 207 U. S. 564), as well as by the general principle that federal property, unless Congress consents, is not subject to state control.

In this connection, we note that the Court of Appeals relies heavily upon this Court's declaration in *California Oregon Power Company* v. *Beaver Portland Cement Co.*, 295 U. S. 142, 163–4: "What we hold is that following the act of 1877, if not before, all non-navigable waters then a part of the public domain became *publici juris*, subject to the plenary control of the designated states (R. III 1039) * * * *with the right in each to determine for itself to what extent the rule of appropriation or the common-law rule in respect of riparian rights should obtain.*" [Emphasis added.] The emphasized portion of the last quotation, omitted by the Court of Appeals in its opinion, casts that which precedes in its proper perspective. We readily recognize that Oregon may either adhere to or reject the riparian doctrine, as respondents contend (Brief for Respondents, p. 9, VI). But the state laws, for reasons expressed in Point I and in our main brief, may not govern the properties of the United States as Oregon has no jurisdiction over them.

For this reason, the authorities relied upon by the Court of Appeals (R. III 1039) and by respondents (Brief for Respondents, p. 15) are not relevant to this case. Nevertheless, in regard to the issues which *are* presented here, this Court's decision in *Kansas* v. *Colorado,* 206 U. S. 46, does in fact recognize that Article IV, Section 3, Clause 2 of the Constitution "* * * is a grant of power to the United States of control over its property." 206 U. S. 46, 89. That power, this Court further declares in *Kansas* v. *Colorado,* extends to "the property belonging to the United States within their [the states] limits." 206 U. S. 46, 89; see Brief for Respondents, page 15. Judge Healy in his dissent recognizes that the power: "is virtually unlimited and may be exercised in such manner as is consistent with its [Congress] views of public policy. *United States* v. *California,* 332 U. S. 19, 27; *United States* v. *City and County of San Francisco,* 310 U. S. 16, 29" (R. III 1041).

It is against the background of that "virtually unlimited" (sec. 310 U. S. at 29) authority in the United States concerning its properties that the decisions of this Court as to the "plenary control" (295 U. S. at 163–4) of the states respecting rights to the use of water must be considered. (See R. III 1039, citing *California Oregon Power Co.* v. *Beaver Portland Cement Co.;* see Brief for Respondents, page 21; also page 22, citing *Ickes* v. *Fox.*) Those two quoted phrases do not, of course,

represent the impact of an irresistible force meeting an immovable object. They pertain to the respective spheres of authority of the federal and state governments. Over the stretch of the Deschutes River here being considered the powers of the National Government are "virtually unlimited", and as Oregon's jurisdiction does not extend to that area, it does not have "plenary control" or any authority which conflicts with that of the United States.[1] The United States in the exercise of its "virtually unlimited" authority necessarily excludes from that area the sovereignty of Oregon. *First Iowa Hydro-Electric Coop.* v. *Federal Power Commission,* 328 U. S. 152, 164.

As this Court stated in the case last cited: "To require the petitioner to secure the actual grant to it of a state permit * * * as a condition precedent to securing a federal license for the same project under the Federal Power Act would vest in the Executive Council of Iowa a veto power over the federal project." The *First Iowa Hydro-Electric case* related to the immunity of the National Government

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[1] Oregon's sovereignty is not "trenched upon" by the license granted for the Pelton power dam and power plant as the state has no sovereignty over the properties involved. The re-regulating dam built to satisfy respondents is not an integral part of the Pelton Project operation but would be constructed at great cost to ~~petitioner~~ the licensee simply to iron out river fluctuations to which respondents object. See Judge Healy's dissent, R. III 1043.

from state control when exercising its power under the Commerce Clause. That same immunity necessarily is involved in this case in which the powers of the Federal Government under the Property Clause (Article IV, Section 3, Clause 2) are challenged by the State of Oregon. Precisely the same principles and considerations apply.

In concluding this phase of the reply to respondents' brief, we refer to the assertion that the United States must comply with Oregon's statutes respecting the appropriation of rights to the use of water. Oregon's Supreme Court, as we have shown above, has rejected that unsound conclusion.[2] On the other hand, compliance by the citizens of Oregon with state law is thereby fulfilling a Congressional requirement for securing title to unappropriated rights to the use of water reserved by the United States for the *public*. See Point I *supra*. Thus, as we have pointed out, it has been judicially declared that the rights of an appropriator do not rest upon state law. Fulfillment of those laws by an appropriator is "only a condition which brought the law of congress into force." *Howell* v. *Johnson,* 89 Fed. 556, 558; *California Oregon Power*

[2] In the brief for respondents, page 25, there are cited statutes respecting the right to appropriate rights to the use of water. The term "concurrent jurisdiction" is there used. That proviso relates to boundary streams between States and not concurrent jurisdiction with the United States.

Company v. *Beaver Portland Cement Co.*, 295 U. S. 142, 162; *Hough* v. *Porter*, 51 Ore. 318, 389. The appropriation of water is "*a grant*" by the federal government to the appropriator of the "right to its use from a nonnavigable stream * * *." *Morgan* v. *Shaw*, 47 Ore. 333, 337. Only if it owned the unappropriated rights to the use of water could the United States grant them.

IV

OREGON DOES NOT HAVE AND HAS NEVER HAD JURISDICTION OVER THE FISHING RIGHTS ON THE STRETCH OF THE DESCHUTES RIVER HERE INVOLVED

Respondents make no attempt to answer the argument set forth in Point IV of the Federal Power Commission's Main Brief (pp. 53-57) relating to the Indians and fishing rights. In fact, respondents do not mention the Indians or the fact that they have consented to the Pelton Project (R. III 1036).

It is important, moreover, though disregarded by the Court of Appeals and respondents, that the "Commission found 'no substantial evidence to show that the facilities proposed for conserving the fish will not maintain existing runs [of anadromous fish]. Moreover, there are indications that the runs can be increased.'" (R. III 1044.) Though not required to do so—for reasons already expressed—the licensee has complied with the spirit and intendment of the statutes cited by

respondents in their brief. Brief for Respondents, page 8.[3]

CONCLUSION

For the reasons expressed in our main brief and this reply brief, the judgment of the court below should be reversed and the cause remanded to that court with instructions to approve the order of the Federal Power Commission granting a license for the Pelton Project.

Respectfully submitted.

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[3] The Oregon Statute on page 8 necessarily modifies the Territorial Act cited on page 7 of the Brief for Respondents.